

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

|                  |   |                               |
|------------------|---|-------------------------------|
| EZEQUIEL ARROYO, | ) |                               |
|                  | ) |                               |
| Petitioner,      | ) | Civil Action No. 05-11277-DPW |
| V.               | ) |                               |
|                  | ) |                               |
| BERNARD BRADY,   | ) |                               |
|                  | ) |                               |
| Respondent       | ) |                               |
| _____            | ) |                               |

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**PETITIONER'S REPLY MEMORANDUM TO RESPONDENT'S MEMORANDUM  
IN OPPOSITION TO THE PETITION FOR HABEAS CORPUS**

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BBO# 225110

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**Preliminary Statement**

This Reply Memorandum of Law is respectfully submitted by the Petitioner, Ezequiel Arroyo ("Petitioner" or "Arroyo"), in response to Respondent's Memorandum in Opposition to the Petition for Habeas Corpus ("R.Mem."). As more fully set forth below, this Court should reject Respondent's arguments and grant the within Petition, ordering a new trial and Petitioner's release from unlawful confinement.

**ARGUMENT**

- I. THE SJC'S HOLDING THAT THE COMMONWEALTH PRESENTED SUFFICIENT EVIDENCE OF THE PETITIONER'S GUILT WAS AN UNREASONABLE APPLICATION OF JACKSON V. VIRGINIA, AND THUS, THE CONVICTIONS VIOLATE DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.**

**A. Standard of Review**

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas relief is permitted where the state court's adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). "This provision governs not only pure issues of law, but mixed questions of law and fact in which legal principles are applied to historical facts." Id., citing Trice v. Ward, 196 F.3d 1151, 1169 (10<sup>th</sup> Cir. 1999).

As the Respondent concedes in its Brief (p. 7-8), a state-court decision may involve an "unreasonable application" of Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Williams v. Taylor, 529 U.S. 362, 413 (2000). "[S]ome increment of incorrectness beyond error is required' . . . The increment need not necessarily be great; but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court." McCambridge v. Hall, 303 F.3d 24, 36 (1<sup>st</sup> Cir. 2002), quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000). If, for instance, the state court reaches a determination that is "devoid of record support for its conclusion or is arbitrary," the AEDPA's unreasonable application prong may be satisfied. McCambridge, *supra*, 303 F.3d at 36-37.

Admittedly, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Nevertheless, the Court in Taylor, *supra*, made clear that ultimately,

. . . [T]he statute [AEDPA] directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. *If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody. . . violates the Constitution, that independent judgment should prevail.*

529 U.S. at 389 (emphasis added).

**B. Discussion**

In this case, the state court's adjudication of his due process claim regarding the sufficiency of the evidence constituted an "unreasonable determination of the facts" in light of the evidence adduced in the state court proceeding. 28 U.S.C. §2254(d); Williams v. Taylor, 529 U.S. at 399.

At the outset, Respondent claims that Petitioner incorrectly relies in its Opening

Memorandum upon Francis v. Franklin, 471 U.S. 307 (1985), a Supreme Court case which reiterates the well-founded principle that due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, *id.* at 313. According to Respondent, Petitioner should refer to the Supreme Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979), which sets forth the applicable test of whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

Respondent's argument is perplexing since Petitioner, in the second sentence of his Opening Memorandum (p. 4) -- and in page 22 of his state court brief (see Respondent's Supplemental Answer, Volume I, Exhibit "2", hereinafter "S.A. Vol.I/2") -- expressly cites to the Jackson case as governing his sufficiency claim, as well as to the standard set forth in Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), which the SJC applied in affirming Petitioner's conviction, and which Respondent concedes, is the

"functional equivalent" of the Jackson standard (R.Mem. 10).

In any event, Respondent goes on to address the merits of Petitioner's sufficiency claim, arguing that the SJC applied the proper Supreme Court precedent, i.e., the Jackson test or its functional equivalent (Latimore, supra), and that the facts adduced at the state trial reasonably supported the SJC's determination affirming the conviction (R.Mem. 11-13).

To the contrary, the SJC's application of the facts in Petitioner's case was unreasonable, the evidence was plainly insufficient to establish Petitioner's guilt beyond a reasonable doubt, and the petition for habeas relief should be granted.

Respondent concedes that, "the Commonwealth did not present any direct evidence that Arroyo was the assailant" (R.Mem. 11). It is undisputed that none of the witnesses to the crime identified the Petitioner as the assailant (see Petitioner's state-court Brief, S.A. Vol.I/2, pp. 4-7, 22-23, with citation to the trial transcript, S.A. Vol. II/1, Trial Transcript, Volume Two, pages 30-56, 89-93, hereinafter "T.II/30-56, 89-93"). Indeed, none of the civilian witnesses to the crime, including Donna Dewar, Norma Serrano,

Helen Fitzpatrick and John Alves, was even asked whether they could identify the Petitioner as the assailant who fled from the scene (see Petitioner's state-court Brief, S.A. Vol.I/2, pp. 4-7, 22-23, with citation to the trial transcript, S.A. Vol.II/1, T.II/30-56, 89-93).

Nor was there any forensic evidence at the scene, such as fingerprint or blood evidence, which sufficiently established Petitioner's guilt. At most, the Commonwealth presented evidence that a green jacket, which was recovered by police along a fence on Virginia Street a substantial distance from the crime scene at 547 Columbia Road (T.II/160, S.A.Vol. II/1; T.III/25-26, S.A. Vol.II/2), contained blood which fit the DNA profile of Arroyo, thereby indicating he was a *possible* source of the blood (T.IV/65-66,87-89, S.A. Vol.II/3). However, the green jacket was concededly never identified as having belonged to Arroyo or been worn by him. Nor, for that matter, was the jacket ever positively identified as having been worn by the assailant. Donna Dewar identified a police photograph of a green jacket lying next to a fence as only being "pretty similar" to the jacket she saw on the man who ran away from the scene (T.II/43,47, S.A. Vol.II/1).

Given this equivocal response, the Commonwealth did not dare ask Dewar whether she could actually identify the green jacket in the courtroom. The other witnesses, Norma Serrano, Helen Fitzpatrick, and John Alves, were never asked to identify the green jacket at all (S.A. Vol.II/1, T.II/30-56, 89-93).

Nor was the green jacket ever tested for gunpowder residue to either confirm or deny the possibility of its use by the shooter. Indeed, this dearth of any identifying evidence mandated the exclusion of the jacket as evidence at the trial (see Petitioner's state-court Brief, S.A. Vol.I/2, pp. 23-24, 33-35).

Moreover, there was no evidence from which to infer that the blood allegedly found on the green jacket was not already on the jacket prior to May 19, 1998, the date of the shooting; in this regard, there concededly was no evidence that the shooter would have bled on the jacket since no one saw any blood on the jacket that day, nor on the path of his flight from the scene (see Petitioner's state-court Brief, S.A. Vol.I/2, pp. 23-24). There was also no evidence that Petitioner had any cuts or scrapes on or about May 19, 1998 -- a fact acknowledged by the SJC in a footnote

observing there was no evidence Petitioner received any injury from use of a gun. Commonwealth v. Arroyo, 442 Mass. at 138, fn 2 (see also Petitioner's state-court Brief, S.A. Vol.I/2, pp. 23-24).

For that matter, descriptions of the assailant's jacket varied, with some describing it as green while others said it was blue; the police radio description referred to the jacket as either "green or blue" (T.II/32,37-39,41,46-47,52,62-63,70-72,140, S.A. Vol.II/1; T.III/17, S.A. Vol.II/2).

Likewise, descriptions of the assailant greatly varied, with some witnesses describing him as: (i) "white" while others said he was "possibly Hispanic"; (ii) as short (5'3") or tall (6 feet); (iii) "husky" or "skinny"; (iv) wearing brown corduroys or blue jeans; and, (v) wearing a black baseball cap or nothing at all on his head (T.II/32,37-39,41,46-47,52,62-63,70-72,140, S.A. Vol.II/1; T.III/17, S.A. Vol.II/2).

Nor was there any ballistics testimony connecting the Petitioner to the crime. Although the Commonwealth presented testimony from Carmen Torres -- a person of dubious past and motive (T.III/150-151, S.A. Vol. II/2) -- that the Petitioner owned a 9mm

handgun (T.III/108-110,136,139-140, S.A. Vol.II/2), the Commonwealth concededly never presented police or expert ballistics testimony at the trial that the five (5) spent casings recovered at the crime scene were 9mm shells (T.IV/17-19, S.A. Vol.II/3). Indeed, the nine millimeter casings found at the scene were excluded from evidence by the trial judge -- a ruling which the SJC found fault with, Commonwealth v. Arroyo, 442 Mass. at 139 fn 5, but obviously could not change *nunc pro tunc*, nor lawfully rely upon in upholding Petitioner's conviction.

In sum, Petitioner has demonstrated by clear and convincing evidence that the SJC's determination affirming the convictions is "devoid of record support for its conclusion or is arbitrary," and the AEDPA's unreasonable application prong has been satisfied. McCambridge, *supra*, 303 F.3d at 36-37. On this ground, alone, the conviction must be reversed.

## **II. PETITIONER'S FOURTH AMENDMENT CLAIM AS TO THE SEIZURE OF BLOOD FROM HIS PERSON.**

Petitioner concedes that his Fourth Amendment claim regarding the Commonwealth's seizure of a blood sample from his person is barred from habeas review by Stone v. Powell, 428 U.S. 465 (1976), as argued by

Respondent (R.Mem. 13-15). This claim is withdrawn and may be dismissed by the Court.

**III. THE SJC'S REJECTION OF PETITIONER'S ARGUMENT CONCERNING THE PROSECUTOR'S BASELESS AND IMPROPER SUMMATION WAS AN UNREASONABLE APPLICATION OF FEDERAL LAW, AND THUS, THE CONVICTIONS VIOLATE DUE PROCESS OF LAW.**

Petitioner has raised two claims concerning the prosecutor's summation, including: (1) improper and admittedly baseless reference to alleged demographic statistics; and, (2) improper and admittedly baseless reference to the murder weapon being a 9mm handgun. Before reaching the merits of either of these claims, Respondent maintains that Petitioner's claim concerning demographic statistics is unexhausted (R.Mem. 20-23), and that the claim concerning the model of the handgun is procedurally defaulted (R.Mem. 16-19). For reasons fully set forth below, Respondent's procedural challenges are baseless, and its substantive argument on the merits is unpersuasive and should be rejected by this Court.

**A. The Claim Concerning Demographic Statistics**

**1. Petitioner Has Exhausted His State Remedies**

Although not filing a motion to dismiss the Petition, Respondent argues in its Memorandum that Petitioner's claim regarding the prosecutor's improper

reference to demographic statistics is "unexhausted" (see R.Mem. 22-23). To the contrary,

If, in state court, a petitioner has 1) cited a specific constitutional provision, 2) relied on federal constitutional precedent, or 3) claimed a determinate right that is constitutionally protected, he will have employed a mechanism which significantly eases any doubt that the state courts have been alerted to the federal issues.

Nadworny v. Fair, 872 F.2d 1093, 1097 (1<sup>st</sup> Cir. 1989).

"[A] fourth method by which presentment may be signaled is where "a petitioner can successfully claim that he has presented the same legal theory to the state court [if he] presents the substance of a federal constitutional claim in such a manner that 'it must have been likely to alert the court to the claim's federal nature.'" Nadworny v. Fair, 872 F.2d at 1097, quoting Dougan v. Ponte, 727 F.2d 199, 201 (1<sup>st</sup> Cir. 1984). Instructive in this regard is the Second Circuit's pronouncement in Daye v. Attorney General of New York, 696 F.2d 186, 194 (2d Cir. 1982):

The ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so

particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Applying the above criteria to this case, Petitioner unquestionably exhausted his due process claim concerning the prosecutor's baseless reference to demographic statistics because in his state court brief (S.A. Vol. I/2), Petitioner: (i) cited the due process clause of the Fifth and Fourteenth Amendments; (ii) cited both federal precedent in support of his due process claim, as well as state precedent which expressly relied upon federal cases; (iii) claimed a determinate right that was constitutionally protected; and, (iv) presented his claim in such a manner that it must have been likely to alert the court to the claim's federal nature. Nadworny v. Fair, 872 F.2d at 1097.

First, Petitioner's invocation of the due process clause and/or the Fifth and Fourteenth Amendments in connection with the prosecutor's improper summation appeared throughout the state court brief (S.A. Vol.I/2), including in the "Issues Presented" section of the brief (p. 1), the "Summary of the Argument" section (p. 20), the caption heading

to Argument VI (p. 39), and in the text of Argument VI, itself (p. 48).

Second, Petitioner did, in fact, cite federal case precedent in his state court brief in support of his claim, notwithstanding Respondent's contention to the contrary. Respondent completely ignores the fact that Petitioner quoted and relied upon the Supreme Court's seminal case of Berger v. United States, 295 U.S. 78, 88 (1935) in support of the due process claim (state court brief, p. 39), a case in which the defendant's conviction was reversed because the prosecutor's improper and baseless remarks in summation were found to violate the fundamental fairness of the proceedings against the defendant. Berger is cited and relied upon in federal cases concerning improper summations which Respondent concedes would fairly raise the federal issue, see United States v. Smith, 982 F.2d 681, 684 fn 3 (1<sup>st</sup> Cir. 1993); Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting) (see R.Mem. 22, 25, referring to Donnelly v. DeChristoforo, *supra*).

Third, Petitioner relied upon state court decisions concerning improper summations in his state court brief which referenced applicable federal law,

which, again, Respondent concedes would fairly raise the issue, including: Commonwealth v. Shelley, 374 Mass. 466, 471-472 (1978) (see state court brief, pp. 39, 42, 44, 46), which cites Donnelly v. DeChristoforo, *supra*, and Berger, *supra*; Commonwealth v. Santiago, 425 Mass. 491, 495 (1997) (state court brief, p. 45, 47-48), which cites Berger, *supra*; and, Commonwealth v. Kozec, 399 Mass. 514, 517 fn 3 (1987) (state court brief, p. 46, 48), which cites Donnelly v. DeChristoforo, *supra*. See generally Nadworny v. Fair, 872 F.2d at 1097 (federal constitutional claim sufficiently exhausted where petitioner relied upon state decisions in his brief which cited federal law).

Indeed, Respondent subsequently observes in discussing the merits of Petitioner's claim that the factors applied by a federal court in examining a claim of prosecutorial misconduct are "substantively identical" to the factors relied upon by the SJC in reaching its determination (R.Mem. 25). In light of this concession, it is difficult to conceive of how Petitioner's constitutional claim has not been fairly presented in the state court. See, e.g., Nadworny v. Fair, 872 F.2d at 1097 (constitutional claim is sufficiently exhausted if petitioner can successfully

claim that he presented the same legal theory to the state court). For that matter, it obviously would be "futile" for Petitioner to return to state court to present the same claim anew, and thus, the claim should be deemed exhausted under the futility exception as well. Allen v. Attorney General of State of Maine, 80 F.3d 569, 573 (1<sup>st</sup> Cir. 1996) ("...[I]f a state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field, then the state judicial process becomes ineffective as a means of protecting the petitioner's rights").

Finally, Petitioner stated a determinate right that is constitutionally protected, plainly arguing in his state court brief that, "...The prosecutor's improper and baseless argument violated state and federal due process and requires a reversal of the convictions. . . ." (p. 48' see also, pp. 1,20,39).

In sum, Petitioner's citation to the applicable amendments of the federal constitution, his reliance upon federal case precedent and state case precedent which refers to the applicable federal law, and his

plain statement of a determinate right that was constitutionally protected, and yet, violated, ". . . must have been likely to alert the court to the claim's federal nature." Nadworny v. Fair, 872 F.2d at 1097. Accordingly, Petitioner's constitutional claim has been sufficiently exhausted in the state courts, and Respondent's challenge on this ground should be rejected. Nadworny v. Fair, 872 F.2d at 1097 (constitutional claims sufficiently exhausted); accord Lanigan v. Maloney, 853 F.2d 40, 44 (1<sup>st</sup> Cir. 1988); Brown v. Streeter, 649 F.Supp. 1554 (D.Mass. 1986).

***B. The Merits Of Petitioner's Claim Concerning The Handgun Should Also Be Considered.***

Respondent urges this Court to ignore the merits of Petitioner's claim concerning the prosecutor's baseless reference to the model of the handgun on the ground that it was not objected to at the state trial, and thus, is procedurally defaulted (R.Mem. 15-20). See generally Coleman v. Thompson, 501 U.S. 722, 729 (1991). Respondent acknowledges, however, that review of a procedurally defaulted claim is permitted if there is a showing of: (1) cause and prejudice from the default, i.e., ineffective assistance of counsel

in failing to object; or, (2) a miscarriage of justice. Harris v. Reed, 489 U.S. 255, 262 (1989); Coleman v. Thompson, 501 U.S. at 729; Burks v. DuBois, 55 F.3d 712, 717 (1<sup>st</sup> Cir. 1995). The "miscarriage of justice" exception additionally requires a showing of actual innocence. Burks, *supra*, 55 F.3d at 717.

Here, Respondent glosses over the fact that the Petitioner, in his state court brief, did indeed argue that counsel's failure to object was not "tactical" and deprived him of the effective assistance of counsel, citing Strickland v. Washington, 466 U.S. 688 (1984) (see state court brief, p. 46, S.A. Vol.I/2). Prejudice from counsel's oversight is readily apparent. As more fully set forth in the merits section of this Argument, *infra*, as a result of counsel's failure to object, the prosecutor improperly connected Petitioner to the crime in the eyes of the jury by first arguing, based upon Carmen Torres's testimony, that Petitioner owned a 9mm handgun, and then unfairly claiming that the murder weapon was also a 9mm handgun -- even though the Commonwealth concededly never presented any evidence that the murder weapon was, in fact, a 9mm handgun.

Moreover, the dearth of any evidence

establishing Petitioner's guilt, as fully established in Argument I, above, may establish Petitioner's actual innocence and that a "miscarriage of justice" will result if the conviction is upheld, as fully set forth in the merits section of this Argument, *infra*. On this ground, too, a review of the merits of Petitioner's claim is available.

Thus, the Court should reach the merits of Petitioner's claim.

**C. Petitioner's Claim Is Meritorious**

The prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

In considering the merits of Petitioner's claim, the "relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainright, 477 U.S. 168, 181 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

Here, the SJC analysis of Petitioner's claim was an unreasonable application of the applicable federal law to the facts of Petitioner's case.

Williams v. Taylor, *supra*, 529 U.S. at 413.

In commenting upon the Petitioner's DNA profile in connection with the green jacket, the prosecutor made the following prejudicial comments not based upon any evidence adduced at trial. See, e.g., United States v. Smith, 982 F.2d 681, 682 (1<sup>st</sup> Cir. 1993) (improper for prosecutor to refer to or rely upon matters not in evidence). The prosecutor stated:

There is no disputing the blood on the jacket fits the defendant's DNA profile. The profile is very rare, as well. If you look at Mr. Arroyo as white, the profile shows that DNA profile only occurs once in every 75,000 people. If you look at Southeastern Hispanic, the numbers are even higher. One out of 81,000 people.

*Now, let's assume, --look at the number of people who live in Boston. Six hundred thousand people or so, give or take. Let's assume there are eight white people with that DNA profile, given those numbers. We assume half the people in Boston are white. Eight.*

*What else can we assume about that general population of people in Boston who are white and have that DNA profile? How many guys fit that profile? Well, forget about the black guys, ladies and gentleman, because the shooter wasn't black. The shooter's description isn't black according to any*

reliable witness in this case. So forget that part. Forget that number.

*Light-skinned Hispanic. A man. Half the people in the general population are not men. So, from that eight or so people, cut it down to four. How many of the people in the general population with that profile are likely to be sixteen to twenty-one years old, young looking? You've got to lose at least one or two guys right there. How many people are left that fit the description of the shooter and can possibly have the defendant's DNA profile? Aren't we getting down to one, light-skinned; height, five-three, five-six, shorter than average?*

*How many people are left? I suggest to you, ladies and gentlemen, the only one left is this man right here, that it's his blood on the jacket. Based on the DNA evidence and the description of the shooter, there is only one person left, the defendant.*

(T.V/68-69, S.A. Vol.II/4) (emphasis added).

At the conclusion of the prosecutor's summation, defense counsel forcefully objected to this portion of the closing argument because no demographic evidence was introduced to establish the population of Boston (T.V/77-78), much less the number of men versus women in the general population, the number of Hispanic men between the ages of sixteen and twenty-one, etc. The trial court agreed with the defense objection (T.V/78), and instructed the jury to disregard the prosecutor's comment:

. . .I just want to tell you that that portion of the Commonwealth's closing statement that referred to the population size of the City of Boston and what can be extrapolated from that is stricken from the record. You are to disregard that in deciding the issues in this case, because there is no evidence about what the population of the City of Boston is presented in this case.

(T.V/79).

Despite the trial court's curative instruction, a reversal was required. The remarks were flagrant, not based on any evidence, and were especially prejudicial, zeroing in on the Petitioner as the "only one left" who could have committed the crime. The prosecutor's closing argument created substantial error which could not be fixed by a curative instruction, and 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainright, 477 U.S. 168, 181 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. at 643.

Equally pernicious, the prosecutor improperly argued on two (2) separate occasions that the gun used in the murder was a 9mm handgun -- *even though there was no evidentiary basis to do so*. First, the prosecutor argued:

At some point that morning she [Carmen Torres] sees a gun on him. She sees a gun on him at the bus stop. She saw a gun on the defendant, "Pitbull", on Sunday as well. She talked to him about the gun on Sunday. He had the gun at her house. She described it as a 9mm gun because that's what he told her it was. It's color he describes to you. *What kind of gun is used in the murder? A 9mm.*

(T.V/57-58, S.A. Vol.II/4) (emphasis added).

Subsequently, the prosecutor again argued, "The defendant had the means to do the crime. He had a gun, *the same type of gun that was used in the crime, the 9mm*" (T.V/70) (emphasis added) (S.A. Vol. II/4).

As previously established in Argument I, *supra*, the Commonwealth failed to present any evidence from its twenty-seven (27) witnesses that the five (5) spent bullet casings recovered from the crime scene were shot from a 9mm weapon. In particular, the Commonwealth never presented police or expert ballisticians testimony at the trial that the five (5) spent casings recovered at the crime scene were 9mm shells. Detective Mark Vickers, the Commonwealth's ballisticians, was never asked and never testified to the caliber of the weapon which fired the five (5) spent shells (T.IV/17-19). Thus, there was no factual basis whatsoever for the prosecutor to twice argue

that the gun used in the murder was a 9 mm handgun. Arguments that are unsupported by the evidence and thus are speculative and conjectural are, of course, improper. United States v. Smith, *supra*, at 682.

The baseless argumentation in the present case was especially prejudicial and mandates reversal. Defense counsel admittedly did not object to the offending argumentation concerning the handgun. Petitioner was obviously prejudiced by such omission. Strickland v. Washington, *supra*. Lacking any identification of the Petitioner at the scene, the prosecutor improperly connected Petitioner to the crime by first arguing, based upon Carmen Torres's testimony, that Petitioner owned a 9mm handgun, and then claiming, without any evidentiary support, that the murder weapon was also a 9mm handgun.

In rejecting Petitioner's argument that the prosecutor's summation was improper and violated due process, the SJC did find that the prosecutor twice deliberately referred to matters not in evidence, including the prosecutor's demographic references and his assertion that a nine millimeter handgun was the murder weapon. Nevertheless, the SJC went on to affirm Petitioner's conviction, holding that the

misstatements were not so prejudicial as to require reversal.

With respect to the demographic references, the SJC applied the four-part test set forth in Commonwealth v. Kater, 432 Mass. 4044, 422-423 (2000), including: (1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave to the jury which may have mitigated the mistake; and, (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions. This test, Respondent maintains (R.Mem. 25), is in substantial accord with its federal counterpart articulated in United States v. Rodriguez-DeJesus, 211 F.3d 482, 485 (1<sup>st</sup> Cir. 2000), discussing: (1) the severity of the misconduct; (2) the contest in which it occurred; (3) whether the judge gave curative instructions; and (4) the strength of the evidence against the defendant.

In affirming the conviction, the SJC acknowledged that Arroyo had objected to the improper statements and that the remarks went to the heart of the Commonwealth's case; nevertheless, the court held

that the trial court's curative instruction "augers for the Commonwealth" and finally held,

. . .the fourth factor [i.e., whether the error "possibly" made a difference]] is determinative. Although the expert's testimony did not establish to a certainty that Arroyo was the source of the bloodstain on the green jacket, it did support a strong inference that he was. Considered in conjunction with the rest of the evidence, we cannot say that the Commonwealth's error, particularly after the judge's curative instruction, made a difference in the jury's conclusions. . . .

Commonwealth v. Arroyo, 442 Mass. at 148.

The SJC's decision upholding the conviction constitutes an unreasonable application of the law to the facts of Petitioner's case because it relies upon the very piece of evidence whose significance the prosecutor intentionally overstated in his summation. The prosecutor argued that the Petitioner "must be the one" because no other Hispanic in the Boston area had the same DNA profile as that found on the green jacket. This deliberate misstatement of evidence -- unfairly attributing qualities to the DNA evidence which could not be found in the record -- might very well have made a difference in the jury's conclusions because the evidence was otherwise far from

overwhelming, if not weak and legally insufficient (see Argument I, *supra*).

Nor could the trial court's curative instruction "unring" the bell which had been "rung" in the courtroom. The prosecutor's point had been made in front of the jury, albeit an entirely baseless and improper one. The SJC entirely overlooked the Petitioner's claim that the prosecutor's closing argument created substantial error which could not be fixed by a curative instruction.

Nor did the SJC consider and discuss the impact of the above-enumerated error *in conjunction with the prosecutor's concededly baseless remark that a nine millimeter gun was used in the crime*. The SJC acknowledged that "the Commonwealth's error was to suggest that there was direct evidence that the victims were shot with a nine millimeter weapon, thus making it more likely that Arroyo, who had a nine millimeter handgun was the shooter." Commonwealth v. Arroyo, 442 Mass. at 148. It then went on to find, however, that there was "no need for such evidence"; that the jury could otherwise have inferred Petitioner's use of a nine millimeter weapon from the record evidence; and, that the rest of the evidence

supporting Petitioner's guilt, including his statements and the evidence linking him to the green jacket, was otherwise sufficient to conclude that, "absent the error, the jury verdicts would have been the same." *Id.*

Again, the SJC's conclusion is unsupported and erroneous. Petitioner's whole point on appeal was that the admitted lack of any evidence that a nine millimeter handgun was used as the murder weapon otherwise negated and rendered meaningless other evidence that the Petitioner allegedly possessed a nine millimeter handgun and could have been the shooter. The prosecutor's second, intentional misstatement -- for which no curative instruction was given -- also went to the heart of the Commonwealth's case and was used to shore up a weak and entirely circumstantial case.

In sum, the cumulative impact of these misstatements by the prosecutor undoubtedly influenced the jury's decision to convict. Petitioner has been "grievously wronged," Chapman v. California, 386 U.S. 18, 24 (1967), by the prosecutor's deliberate misstatements of evidence: the jury undoubtedly, and unfairly, concluded that Petitioner was the shooter

based upon the prosecutor's baseless comments that the demographic "evidence" pointed to that inescapable conclusion, and, that a nine millimeter handgun was the murder weapon. The prosecutor's improper and baseless argument, "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainright, 477 U.S. at 181, quoting Donnelly v. DeChristoforo, 416 U.S. at 643.

**IV. PETITIONER'S CLAIM THAT THE STATE COURT ADMITTED EXPERT WITNESS TESTIMONY CONCERNING PREJUDICIAL DNA BLOOD EVIDENCE WITHOUT FIRST CONDUCTING A DAUBERT HEARING IS NOT BARRED FROM HABEAS REVIEW ON THE GROUND OF PROCEDURAL DEFAULT.**

To ensure the reliability of DNA test results as a matter of due process, a trial judge, *sua sponte*, must conduct a hearing in the first instance and make a threshold inquiry concerning the reliability of the testing procedures before submitting such evidence to the jury. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Here, the state trial court erred badly by failing to conduct a preliminary hearing, *sua sponte*, concerning the reliability of the testimony of the Commonwealth's expert witness, Joseph Valaro, of the Boston Crime Laboratory, concerning PCR-based DNA testing which was conducted on a blood

sample taken from the green jacket, recovered by police, and compared by Valaro to DNA samples from the Petitioner and from the victim, Luis Rivera (T.IV/83-88, S.A. Vol.II/3). Although Rivera was excluded as the source of the blood, the Petitioner was allegedly not excluded and was a possible source of the blood on the jacket (T.IV/85-87,92).

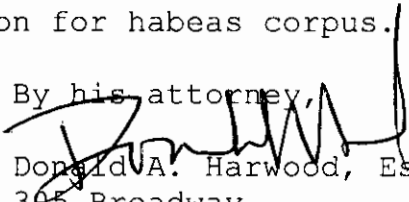
Respondent nonetheless argues that this claim is procedurally defaulted because of trial counsel's failure to object at the trial, and thus, is not entitled to habeas review (R.Mem. 15-20). Respondent once again glosses over the fact that the Petitioner, in his state court brief, argued that counsel's failure to object deprived him of the effective assistance of counsel, citing Strickland v. Washington, 466 U.S. 688 (1984) (see state court brief, p. 38, S.A. Vol.I/2), thereby permitting habeas review of his claim. Coleman v. Thompson, 501 U.S. at 729.

Finally, prejudice from counsel's oversight is readily apparent because the reliability of Valaro's expert witness testimony (and the DNA test results upon which it was based) was never established before its submission to the jury, including whether: (i)

reliable and proper testing procedures were employed;  
(ii) proper protocol at the laboratory was established and followed; (iii) extraneous facts or data relied upon by Valaro were of the type reasonably relied upon by experts in the field; and/or (iv) whether Valaro's statistical analysis was based upon generally accepted DNA testing in the scientific community.

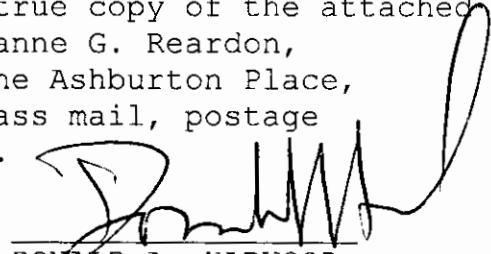
**CONCLUSION**

For the above-stated reasons, this Honorable Court should grant the petition for habeas corpus.

By his attorney,  
  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the attached documents was served upon Susanne G. Reardon, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, by first class mail, postage prepaid, on September 9, 2005.

  
DONALD A. HARWOOD